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In the

Supreme Court of the United States

October Term, 1968
No. 443

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
LEHIGH VALLEY RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE DELAWARE AND HUDSON RAILROAD CORPORATION, READING COMPANY,
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
WESTERN MARYLAND RAILWAY COMPANY,
ERIE LACKAWANNA RAILROAD COMPANY,
MONTOUR RAILROAD COMPANY,
THE MONONGAHELA RAILROAD COMPANY,
PITTSBURGH, CHARTIER & YOUGHIOGHENY RAILWAY COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1968

No.

Pennsylvania Public Utility Commission,
Petitioner

v.

Bessemer and Lake Erie Railroad Company,
The Pennsylvania Railroad Company,
Lehigh Valley Railroad Company,
The New York Central Railroad Company,
The Baltimore and Ohio Railroad Company,
The Delaware and Hudson Railroad Corporation,
Reading Company,
The Central Railroad Company of New Jersey,
The Pittsburgh and Lake Erie Railroad Company
Western Maryland Railway Company,
Erie Lackawanna Railroad Company,
Montour Railroad Company,
The Monongahela Railroad Company,
Pittsburgh; Chartiers & Youghiogheny Railway Company,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Pennsylvania Public Utility Commission, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause.

OPINIONS OF THE COURTS BELOW

The opinion of the Superior Court of Pennsylvania is reported at 210 Pa. Superior Ct. 7, 230 A. 2d 220 (1967).

The opinion of the Supreme Court of Pennsylvania is reported at 430 Pa. 339, A. 2d (1968) and attached hereto as Appendix I, and the order of the Supreme Court of Pennsylvania denying the petition of the Pennsylvania Public Utility Commission for reargument is attached hereto as Appendix II.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 21, 1968. The order of the Supreme Court of Pennsylvania denying the petition of Pennsylvania Public Utility Commission for rehearing was entered on July 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED FOR REVIEW

1. Did the Supreme Court of Pennsylvania err in holding that Section 25 of the Interstate Commerce Act, 49 U.S.C. Section 26, dealing with the installation of mechanical devices to prevent rear-end train collisions, completely occupied the field and preempted all state regulation dealing with flag protection?

STATUTES INVOLVED

Section 25, Part I of the Interstate Commerce Act, as amended, 49 U.S.C. §25, 49 U.S.C.A. §26 (printed at length in Appendix III, attached hereto and made part hereof).

Sections 401, 413, 901, 902 of the Public Utility Code, 66 Purdon's Stat. Ann. §§1171, 1183, 1341, 1342, Act of May 28, 1937, P. L. 1053 (printed at length in Appendix IV, attached hereto and made part hereof).

STATEMENT OF THE CASE

On October 26, 1964, the Cooperative Legislative Committee, Railroad Brotherhoods in the Commonwealth of Pennsylvania, C. J. Sludden, W. P. Fullerton and W. D. Smith, on their own behalf and as representatives of their respective brotherhoods and the constituent lodges of such brotherhoods in the Commonwealth of Pennsylvania, filed a petition (the Pennsylvania Public Utility Commission gave the petition a docket number, Docket P. 7) with the Pennsylvania Public Utility Commission (hereinafter "Commission") requesting that the Commission:

> ". . . promulgate a regulation or regulations requiring that a member of the crew must go back immediately with proper flagging equipment a sufficient distance to insure full protection when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block signal system rules."

Answers to the petition were filed by the majority of the railroads operating within the Commonwealth of Pennsylvania including the respondents in the above case who were appellants in the state courts.

Immediately before this, a complaint had been filed with the Commission on July 22, 1964, by the Cooperative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, Lester F. Gray, W. C. Livengood and W. L. Whitney, individual employees, against the Pitts-

burgh and Lake Erie Railroad Company ("P. & L. E.") seeking an order directing P. & L. E. to reinstitute adequate and proper flag protection upon its system within Pennsylvania. Hearings were held on that complaint on four separate days concluding on January 18, 1965. So far as the petition was concerned (Docket P. 7) hearings were held by the Commission in Harrisburg on February 8, 9 and 10, March 8, 9, 10, 11, 12, 29 and 30, 1965; and in Philadelphia on April 13, 14, 15 and 23, 1965. The Brotherhoods presented witnesses from the railroads: The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware and Hudson Railroad Corporation, Erie Lackawanna Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company. The carriers presented witnesses from the above named Railroads and, in addition, witnesses from the Bessemer and Lake Erie Railroad Company, The Pittsburgh and Lake Erie Railroad Company, and the Pittsburgh, Chartiers and Youghiogheny Railroad Company, and the Union Railroad Company.

After the filing of briefs, oral argument was heard by the Commission on July 27, 1965.

On November 22, 1965, the Commission issued similar orders in Docket P. 7 and Complaint Docket 18018. The petition in P.7 had alleged that the railroads, for many years prior to the filing of the petition, had an operating rule known as "Rule 99," which allegedly provided that when a train stopped under circumstances in which it might be overtaken by another train, a member of the crew was required to go back immediately with flagging equipment a sufficient distance to insure full protection. It was further alleged that some of the railroads had

recently changed their flagging rules to make them non-applicable to trains operating under locomotive cab signal system rules, automatic block signal system rules and manual block signal system rules, although it was alleged that under all such systems, trains might be overtaken by following trains. The petition further alleged that such action by the railroads created an unreasonable risk of harm to train crews and, in the case of passenger trains, to the travelling public.

The Public Utility Commission, in its November 22, 1965 order, after a comprehensive study of the facts, made the following order:

> "Upon full consideration of the matters and things involved, we are of the opinion and find that the elimination of flag protection against following trains, as has been effectuated by various carriers in Pennsylvania during recent months, by the revision of the operating rules governing flagging, has decreased the degree of safety available to the public and to railroad employees, and that continued adherence to the 'no flagging' practice would seriously impede efforts to increase railroad safety and serve to decrease the margin of safety provided for rail operation; therefore,
>
> "IT IS ORDERED:
>
> "1. That the prayer of Petition No. 7 be granted.
>
> "2. That the motion to dismiss the petition filed March 26, 1965 by the Pittsburgh and Shawmut Railroad Company be denied.
>
> "3. That all railroads operating in the Commonwealth of Pennsylvania, within 30 days of service

hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees so as to require that flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main or secondary tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, except within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification or storage yard and manual block territory protected by an absolute block.

"NOTE: When trains are operating under automatic block signal system rules (locomotive cab signal or centralized traffic control signal rule), the requirements of flagging, insofar as protecting against following trains is concerned will have been complied with when full protection is afforded against trains moving at restricted speed.

"4. That the above requirement be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof."

Upon following the issuance of the orders, the respondents placed the order into their railroad regulations as new Rule 16 and filed appeals with the Superior Court of Pennsylvania. Upon the Commission's petition, the Superior Court remanded the record to the Commission

concerning its orders of November 22, 1965 at Dockets P. 7 and C. 18018. Further hearings were held by the Commission on May 12, 1966 and July 7, 1966. The proceedings at Dockets P. 7 and C. 18018 were consolidated for the purpose of these hearings. The Commission by order dated December 19, 1966, then issued a consolidated order as follows:

> "Furthermore, upon review of the supplemented record and reconsideration of all pertinent facts contained therein and the pleadings of the various respondents, we are convinced that our finding, as propounded in the November 22, 1965 order; viz., that the safety of the public and of railroad employees requires flag protection under all circumstances, when a train is stopped or when a train is moving under circumstances in which it may be overtaken by another train, is reasonable and well supported by the record, that the basic requirements of our order are in the general interest of the public and should not be materially disturbed. However, in order to eliminate the apparent confusion and misinterpretation of certain diction used in our existing order, flagging should be performed on main tracks, secondary tracks, or on any tracks used for the movement of trains, where a train, stopped or moving, may be overtaken by another train, whether within a yard proper; adjacent to the entrance to a yard; or in areas designated by a railroad as yard limit territory.
>
> "In the circumstances, and being satisfied that the proposed changes are in the interest of safety, and in the public interest generally, we find and determine that our order issued November 22, 1965 in the Petition 7 proceeding should be modified and it

also follows that our findings in C. 18018 should be modified. We are further of the opinion and find that the proper rule to be placed in effect and rigidly enforced and adhered to is Rule 99 as it existed prior to 1945; Therefore,

"It Is Ordered:

"1. That numbered Paragraph 3 on page 13 of our order issued at P. 7, November 22, 1965, which reads as follows, to wit:

> " '3. That all railroads operating in the Commonwealth of Pennsylvania, within 30 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees so as to require that flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main or secondary tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories, except within the limits of interlocking plants, at stations where passenger trains are making normal station stops, within the limits of a classification or storage yard and manual block territory protected by an absolute block.
>
> " 'Note: When trains are operated under automatic block signal system rules (locomotive cab signal or centralized traffic control signal

rule), the requirements of flagging insofar as protecting against following trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed.'

be and is hereby modified to read as follows:

"3. That all railroads operating in the Commonwealth of Pennsylvania, within 45 days of service hereof, promulgate appropriate operating rules and special instructions for the government of their respective employees in conformity with the following:

'(a) When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and/or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail and when necessary, in addition, display lighted fusees.

"(b) When recalled and safety to the train will permit, he may return.

"(c) When conditions require, he will leave the torpedoes and a lighted fusee.

"(d) The front of the train must be protected in the same way, when necessary, by a member of the crew.

"(e) When a train is moving under circumstances in which it may be overtaken by another train, a member of the crew must take such action as may be necessary to insure full protection. By night (or by

day, when the view is obscured) lighted fuses must be dropped off the moving train or displayed at proper intervals.

"(f) When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

"(g) Conductors and enginemen are responsible for the protection of their trains.

"(h) When a pusher engine is assisting a train, coupled behind the cabin or caboose car, and the member of the crew who protects the rear-end of the train is riding in the cabin or caboose car, the requirements as to the use of fusees will be met by dropping them off between the cabin or caboose car and pusher engine on the track the train is using, and not between that track and an adjacent track.

"2. That numbered paragraph 4 on page 13 of our order issued at P. 7, November 22, 1965, which reads as follows, to wit:

"'4. That the above requirement be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof.'

be and is hereby modified to read as follows:

"4. That the above-revised paragraph 3 be incorporated in the Railroad Regulations of this Commission and be designated Rule 16 thereof.

"3. That numbered paragraph 2 on page 18 of our order issued at C. 18018, November 22, 1965, which reads as follows, to wit:

> "'2. That The Pittsburgh and Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations.'

be and is hereby modified to read as follows:

> "2. That The Pittsburgh and Lake Erie Railroad Company forthwith require that passenger and freight trains on its line of railroad within the Commonwealth be operated in a manner consistent with Rule 16 of the Commission's Railroad Regulations as revised this date.
>
> "4. That in all respects not inconsistent herewith, our orders issued November 22, 1965, at P. 7 and at C. 18018, remain in full force and effect, and that the record herein be returned to the Superior Court of Pennsylvania forthwith."

Following the Commission's order of December 19, 1966, additional appeals were taken by several of the respondents. All of the appeals were now consolidated for argument before the Superior Court. After extensive oral argument, the Superior Court, on May 17, 1967, issued orders refusing the petitions filed by respondents for supersedeas and stay, and, also, denied the Commission's motion to quash the appeals on the ground that the appeals were from the rule making powers of the Commission and, hence, were not appealable. On June 16, 1967, the Superior Court filed its opinion affirming the orders of the Commission.

The railroads then filed their petition with the Pennsylvania Supreme Court for Allowance of Appeal, and

that petition was granted, but limited solely to the question of Federal preemption. After additional briefing and oral argument, the Pennsylvania Supreme Court, in a vote of 4 to 3, on May 21, 1968 reversed both the orders of the Superior Court and the Pennsylvania Public Utility Commission on the ground that the orders of the Pennsylvania Public Utility Commission had been completely preempted by Section 25 of the Interstate Commerce Act, 49 U.S.C. §26. The majority opinion was written by Mr. Justice Roberts for the Court, consisting of Justices Bell, Jones and O'Brien, Mr. Justice Cohen filed a dissenting opinion in which Mr. Justice Eagen joined, and Mr. Justice Musmanno filed a dissenting opinion. The Cooperative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania and certain named individuals were permitted to intervene and to make oral argument and file briefs before the Superior and Supreme Court.

THE REASON FOR ALLOWING CERTIORARI

The Supreme Court of Pennsylvania has decided a Federal question of considerable substance in a manner which does not accord with applicable decisions of this Court and which concerns a substantial issue of safety throughout the entire United States.

The majority opinion held that because the Interstate Commerce Commission is given the authority to order the installation of mechanical devices to help stop and control train movements on the same track so as to prevent rear end collisions, the states no longer have any authority to make necessary rules and regulations for use of manual flagging by flagmen, who would be used under conditions found to be necessary for the safety, health and welfare of the citizens.

While the Interstate Commerce Commission has developed an efficient system for the control and supervision of the installation of mechanical devices under Section 25, the Interstate Commerce Commission has taken no action concerning flagging, which has traditionally been regulated by the states.

The majority opinion recognizes that neither the Interstate Commerce Commission nor the Department of Transportation has ever issued any regulations covering flag protection and, yet, notwithstanding this nonexercise, holds that the State of Pennsylvania is without authority to require flag protection.

The majority opinion holds that Section 25 of the Interstate Commerce Act impliedly empowers the Inter-

state Commerce Commission to make rules pertaining to flag protection, and, although it has not, the "silence of Congress" doctrine operates to "occupy the field" so as to preempt state regulation.

Your petitioner submits that under these circumstances, there is no such preemption, there is no Federal exercise of power to which the state exercise of power is inconsistent, and whether or not the Interstate Commerce Commission is authorized to issue flagging, since it has not done so, state regulation can stand. Moreover, Section 25 of the Interstate Commerce Act has not empowered the Interstate Commerce Commission to regulate manual flag protection.

The majority opinion of the Pennsylvania Supreme Court is in conflict with decisions of the highest court in other states as well as state administrative bodies, and overlooks many pertinent decisions of your Honorable Court dealing with the question of preemption which make it clear that the actions of the state in the instant case cannot be held to have been superseded or preempted. See, for example,

Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co., 382 U.S. 423, 86 S. Ct. 594 (1966);

Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 83 S. Ct. 1022 (1963);

California v. Zook, 336 U.S. 725, 69 S. Ct. 841 (1949).

The majority opinion creates a gap in the field of safety by nullifying state authority which has traditionally

existed in the field and to which the Interstate Commerce Commission has given due deference.

The Honorable Robert W. Ginnane stated, in correspondence appended to the briefs in the State Supreme Courts, that the Interstate Commerce Commission "has never formally construed Section 25 of the Interstate Commerce Act, 49 U.S. Code 26, as including such flag protection."

The letter of H. R. Longhurst, Acting Director of the Bureau of Railroad Safety for the Department of Transportation stated: "The manner in which flag protection is provided is an operating matter over which we do not exercise jurisdiction."

The conclusion by the majority opinion that state regulation is null and of no effect is not in accordance with applicable decisions of this Court, is not compelled by logic, is not supported by reason, and is directly contrary to the welfare and well-being of the country, and, hence, is erroneous and should be reversed.

ARGUMENT

I.

Where the Interstate Commerce Commission Has Either Been Denied Authority Over Flag Protection or Has Failed To Exercise Such Authority, but Has Limited Its Activity in the Field to Mechanical Train Control and Train Stop Devices, the States Still Remain Free To Make Rules and Regulations Pertaining to Flag Protection for the Safety and Health and Welfare of Its Citizens

A. The Interstate Commerce Commission has no jurisdiction to prescribe flagging or flag protection.

The majority opinion of the Supreme Court of Pennsylvania states that the Interstate Commerce Commission, by Section 25 of the Interstate Commerce Act, 49 U.S.C. §26, has conferred authority upon the Interstate Commerce Commission to regulate flag protection of interstate trains. The opinion states that:

> ". . . flagging can certainly be classified as either a 'method' or a 'system' ".

The history of the train control act, as it is popularly known, does not bear out the Court's statement.

The original act was passed in 1920 with the Transportation Act of 1920 and was the result of a number of years of investigation by Congress into mechanical

devices which could automatically halt trains travelling on the same track in order to prevent a rear end collision. A reading of the committee reports and the legislative debates reveals very little discussion of Section 25 of the Act, since there was general agreement that such mechancial devices were needed. There is no mention made any place concerning the need for Federal control of flag protection!

While the act was amended several times procedurally for minor reasons, the major amendment came by the Act of August 26, 1937, 50 Stat. 39. By that amendment, Congress conferred the authority upon the Interstate Commerce Commission to deal not only with automatic train control devices, which was the only mechancial device mentioned in the 1920 Act, but conferred authority upon the Interstate Commerce Commission to deal also with other devices, such as block-signal systems, cab-signal systems, and interlocking-railway crossing devices. The discussion of this amendment in the Congressional record makes it crystal clear that Section 25 of the Interstate Commerce Act concerns only the installation of mechanical devices.

For example, Representative Martin of Colorado, who was asked to be the spokesman for the Interstate Commerce Committee on the floor, stated as follows:

> "As I understand the legislation, it involves principally what is known as the block signal system, which operates and controls train movements over the railways by signals instead of by telegraphic orders, delivered to trainmen. There is also an interlocking provision of the bill, and that simply refers to interlocking railway crossings where railways cross

each other. Also, the bill refers to cab-signal devices. . . ."

81 *Cong. Rec.* 9012-9013.

Representative Martin also said as follows:

"Mr. Speaker, all we are doing under this legislation is extending the authority of the Interstate Commerce Commission to inspect signal equipment and to coordinate the different signal apparatus that are now being used by the standard railroads throughout the United States."

81 *Cong. Rec.* 9014.

By this amendment, Congress provided that the Interstate Commerce Commission has jurisdiction over ". . . other similar appliances, methods and systems intended to promote the safety of railroad operation . . ." Congress, by this overall clause, wanted to prevent the type of thing that necessitated the 1937 amendment, namely, the making of an amendment to cover a new device or mechanical system that would come into being. At no time, in any of the debates or committee reports, is there any reference to flag protection. The catchall phrase "other similar appliances, methods and systems" must be viewed under the doctrine of *ejusdem generis* and limited to the type of mechanical devices previously specified in the act, which certainly would not cover manual flag protection. The majority opinion of the Supreme Court of Pennsylvania classifying manual flagging as a "method" or "system" under the act ignores the background and legislative history of the legislation.

It may be noticed that flag protection in the railroad industry was well-known in 1920 as well as 1937. Such

protection in 1920 constituted the basic form of protection the railroads offered against rear end collisions. Yet, Congress did not mention it by name when conferring authority upon the Interstate Commerce Commission to prevent rear-end collisions by Section 25. The only conclusion to be drawn from this is that Congress intended such flag protection to continue to be regulated by the states. To draw the conclusion that Congress, by not mentioning flag protection in Section 25, thereby sought to remove flag protection as a means of preventing rear end collisions would be absurd! Yet, the Supreme Court of Pennsylvania says just this when it says:

> "The first reason for our decision today, that Section 25 devices perform the same function as flagging, needs little expansion . . . Congress having once determined how best to avoid this type of disaster [namely, rear end collisions], it is no longer open to the states to decide that the federal protections are inadequate and that additional safety measures might be taken by interstate railroads whenever their trains run through Pennsylvania."

The Court then contradicts itself by pointing out that "flagging" is a "method" or "system" embraced within Section 25. If mechanical devices perform the same function as "flagging," why would Congress confer both powers on the Interstate Commerce Commission? Moreover, the canons of judicial construction chasten against using such words as "system" or "method" to enlarge powers never intended.

Your Honorable Court has frequently been called upon to interpret general words, and, invariably, the Court has limited any far reaching interpretation. For example,

in *United States v. Pennsylvania R.R. Co.*, 242 U.S. 208, 229, the Court said in interpreting the word "practice":

> "Following a well known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates."

In the latter case, the Court noted the danger of using a term "ambushed in obscurity" and involving a construction "that could be disputed and was disputed" and which would turn "accepted custom into delinquency", 242 U.S. 229.

If the Interstate Commerce Commission had authority to regulate flag protection, its failure to do so up until now would seem to be a delinquency on the Commission's part. As previously noted, however, the Commission has never interpreted Section 25 to give it jurisdiction over flag protection.

The Court in the *Pennsylvania Railroad* case makes it clear that Congress usually covers the subject of safety by careful, specific rules, noting the Safety Appliance Act as an example. Ironically, the Court indicates that the Train Control Act was not encompassed within the term "practice." The majority opinion of the Pennsylvania Supreme Court is therefore in error in holding that flag protection is encompassed within Section 25.

It may be noted in passing that while the Interstate Commerce Commission has adverted in several orders to Rule 99 of the railroads' regulations which provide for flagging, the Interstate Commerce Commission never made any orders concerning flag protection, what flag protection consists of, how it is to be done, when it is to

be done, etc., leaving this entirely to the States and the railroads to work out among themselves.[1]

The first question which must be answered in this case is whether Congress has conferred the power to prescribe flag protection upon the Interstate Commerce Commission. For the reasons set forth above, we submit it has not.

B. There is no "silence of Congress" preemption.

Its failure to do so is not a mandate that the States were not to legislate on flagging. In fact, the opposite conclusion is more reasonable and likely.

Your Honorable Court has rejected many times innuendoes of preemption by silence. For example, in *Atchison Railway v. Railroad Commission,* 283 U.S. 380, 391 (1931), a party argued:

> "That is, that it was the intention of Congress to prevent the exercise of state power in this matter of serious public interest, **although no authority was given to the federal commission to meet the public need.** Such an intention to override existing state authority to deal with local exigencies is not to be im-

---

[1] Flagging is not all by hand signals but can be done by torpedoes, fuses, and similar methods. Flagging may be the only means of protection on a railroad where the train is halted or stopped outside of any signal system. The Pennsylvania Public Utility Commission requires flagging, more importantly, outside of automatic-block and manual block territories, areas that the I.C.C. could not conceivably protect under Section 25. Yet, the Pennsylvania Supreme Court holds state regulation superseded, even in these areas.

puted to the Congress unless its enactment compels that conclusion."

Your Honorable Court has made it clear that preemption from Congressional silence must be determined by the "conflicts" rule. In *California v, Zook,* 336 U.S. 728 (1949), your Honorable Court stated:

> "Certain first principles are no longer in doubt. Whether as inference from Congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the Cooley case's broad delineation of the areas of state and national power over interstate commerce." (Citations omitted.)
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> • • • • • • • •
>
> "But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the State action conflict with national policy? The Cooley rule and its later application, Southern Pacific Co. v. State of Arizona ex rel. Sullivan, supra, the question of congressional 'occupation of the field,' and the search for conflict in the very terms of state and federal statutes are but three separate particularizations of *this* initial principle."

The Court then goes on to explain in the *Zook* case that the "coincidence" rationale is ". . . only an application of the first principle of conflict with national policy."

The Court noted that the intent to displace local laws "must be clearly manifested" (citing cases) and that the conflict necessary to vitiate state laws must be "clear."

There is no conflict here, let alone a "clear" conflict. Flagging, as ordered by the Pennsylvania Commission,

does not impair or interfere with the operation of the automatic-block or manual-block systems. The Pennsylvania Supreme Court recognized that the order of the Pennsylvania Commission was supplementary, but, nevertheless, relied upon the *Napier* case and the *Pennsylvania R. v. Public Service Commission of Pennsylvania,* 250 U.S. 566 (1919), both of which are distinguishable and have been limited considerably by later cases.

For example, in *California v. Zook,* 336 U.S. 725, 729 (1949), the Court indicated that such mechanical formulations as "coincidence is as ineffective as opposition" are not to be taken literally. The Court indicated that each case must be judged on its facts, and that the "conflicts" test is really the criterion to be applied.

The New Jersey Court, in the *Complaint of Brotherhood of R.R. Trainmen; Pennsylvania Railroad v. The Board of Public Utilities of New Jersey,* 49 N.J. 174, 229 A. 2d 505, 509 (1967), properly notes that:

> "Napier has never been applied as broadly as the Railroads contend (cf. Terminal R. Assn. of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 4; 63 S. Ct. 420; 87 L. Ed. 571, 576 (1943); Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 766; 65 S. Ct. 1515, 89 L. Ed. 1915, 1922 (1945)); in any event, it dealt, not with a supplemental local emergency safety device, such as flagging, but with equipment attached to the locomotive which passes through from state to state and with respect to which the national interest in uniformity is vital and paramount."

Your Court, in *Campbell v. Hussey,* 368 U.S. 310, 311, 312, 82 S. Ct. 327 (1961), makes clear that formulations

of a mechanical nature cannot decide concrete cases. For example, the Court said:

"... The Court makes no attempt to relate this fact to the issue in this case and show just how this congressional purpose supports an inference that Congress intended to preclude the States from requiring that the 'uniform standards of classification' so established and applied by official federal inspection be disclosed on each lot of tobacco sold. Instead the Court proceeds from the bare fact of congressional legislation to the conclusion of federal pre-emption by application of a mechanistic formula which operates independently of congressional intent. That formula, as stated by the Court, is that 'complementary state regulation is as fatal as state regulations which conflict with the federal scheme.' I know of no case in which this formula has previously been applied by this Court. Certainly, the three cases which it cites do not support its action here.

"Missouri Pacific R. Co. v. Porter, the first case cited by the Court, did make the statement that state laws 'cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.' But this statement was made only after the Court had discussed the congressional act involved there in great detail and found Congress to have concluded that 'no other regulation is necessary.' That the Court in Missouri Pacific did not intend to go outside of the facts there before it and lay down a rule of automatic pre-emption by 'coincidence' is plainly shown by the authorities relied upon to support

its passing reference. The first case cited, Napier v. Atlantic Coast Line R. Co., is typical. In Napier, Mr. Justice Brandeis, in his usual careful way, declared that in considering the question of pre-emption '*The intention of Congress to exclude States* from exercising police power must be clearly manifested * * *.' The Missouri Pacific case can therefore support pre-emption only upon the basis of congressional intent and does not lend the slightest support to the mechanistic pre-emption rule which the Court applies here."

The Court in *Campbell* goes on to distinguish any such misinterpretation of certain language in *Rice v. Santa Fe Elevator* case, and states, as follows (368 U.S. 313):

> "Far from supporting the mechanical formula used by the Court here to declare Georgia's law unconstitutional, Santa Fe Elevator stands as a clear refutation of that formula, and contains a very clear statement of the proper rule which before today has governed this Court's holdings on pre-emption—the rule that pre-emption of the historic police powers of the States can be found only where 'that was the clear and manifest purpose of Congress.' "

The Court clearly reaffirms the doctrines set forth in *California v. Zook* (368 U.S. 314), and also quotes from Justice Holmes, but in a manner conveying the opposite meaning than that given by the majority opinion of the Pennsylvania Supreme Court (see 368 U.S. 314). The Pennsylvania Supreme Court in the same mechanical fashion disapproved of in the *Campbell* case, says in this case:

> " 'When the United States has exercised its exclusive powers over interstate commerce as far as to

take possession of the field, the States no more can supplement its requirements than they can annul them' ". (403 Pa. 347).

Your Honorable Court has clearly spelled out that this mechanistic formula (which Justice Roberts applied for the court below in this case) is nothing "but a dissenting view." (368 U.S. 315).

Your Honorable Court in *Campbell v. Hussey,* supra, even makes it clearer that reliance upon certain isolated statements of Justice Holmes for a mechanistic formulation of preemption is misplaced, and that Justice Holmes stands for a judgment upon the particular case (368 U.S. 314). The Pennsylvania Supreme Court, in relying upon the remarks of Justice Holmes that supplementary legislation by States is ineffective was unaware of the limitations your Honorable Court had placed on these scattered remarks in previous cases. See, e.g., *Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 783 (1947) and *Campbell v. Hussey,* supra.

In the *Campbell* case, your Honorable Court cites a list of cases in footnote 29 for the proposition that the historic police powers of the States are not superseded unless there is a clear and manifest purpose and these cases ". . . plainly show that this Court has consistently rejected the idea that every time Congress passes a law, all State laws touching on the same subject are automatically destroyed." (368 U.S. 315).

C. Assuming, arguendo, that Section 25 authorizes the I. C. C. to regulate flagging, the unexercised power by the I. C. C. does not oust states action.

Even if it be assumed, arguendo, that Section 25 authorizes the Interstate Commerce Commission to make rules pertaining to flag protection, the fact remains that no such rules have been made and the law has been well settled in such a case that until the Interstate Commerce Commission acts, the state is free to act.

Eicholz v. Public Service Commission of Missouri, 306 U.S. 268, 273;

Welch Co. v. New Hampshire, 306 U.S. 79;

McDonald v. Thompson, 305 U.S. 263.

In *Terminal Assn. v. Trainmen,* 318 U.S. 1, 4-5 (1942), your Honorable Court stated along the same lines:

> "At least in the absence of such action, these Acts do not themselves preclude the state order, Atlantic Coast Line v. Georgia, 234 U.S. 280. cf. Welch Co. v. New Hampshire, 306 U.S. 79."

In a long line of cases your Court has indicated that it is the actual conflict with the exercise of power by the Interstate Commerce Commission which nullifies state action and not the latent authority on the part of Congress. For example, in *Kelly v. Washington,* 302 U.S. 1, 10, your Honorable Court stated:

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is super-

seded **only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'** "

In *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board,* 315 U.S. 740, 749, it was stated:

"We will not **lightly infer** that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

In *Southern Pacific Co. v. Arizona,* 325 U.S. 761, at 766, it is stated:

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested [cases cited], or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. [Cases cited]."

In *Mintz v. Baldwin,* 289 U.S. 346, 350, it is stated:

"The purpose of Congress to supersede or exclude state action against the ravages of the disease is not **lightly** to be **inferred.** The intention to do so must definitely and clearly appear."

In the *Brotherhood of Locomotive Engineers v. Chicago, R. I.,* 382 U.S. 423, 86 S. Ct. 423 (1966), the Supreme Court said:

"In the absence of congressional legislation on that subject, however, the *States have extensive power*

of their own to regulate in this field, particularly to protect the safety of railroad employees and the public.'' (Emphasis supplied.)

In *Monongahela Connecting Railroad Company v. Pa. P.U.C.*, 373 F. 2d 142, 17 A.L.R. 3d 271 (3rd Cir. 1967), the 3rd Circuit Court ruled that the Public Utility Commission had jurisdiction to order the railroad to attach air brakes to an intrastate movement notwithstanding the Safety Appliance Act applies to railroads engaged in moving interstate traffic. Since the Safety Appliance Act would not apply to an intrastate movement, it held that the states still retained that power of action. On this point the Court said as follows:

> ''Where federal legislation admits of a gap the state may pass appropriate laws, to take care of needed protection, which do not conflict with their federal counterparts, Atlantic Coast Line v. Georgia, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914); Terminal Assn. v. Trainmen, 318 U.S. 1, 63 S. Ct. 420, 87 L. Ed. 571 (1943). The hot metal movement, because of its position in relation to the Safety Appliance Act and its extremely hazardous nature, comes within the sphere of appropriate state regulation. In Smith v. Alabama, 124 U.S. 465, 8 S. Ct. 564, 31 L. Ed. 508 (1888), the Court stated:
>
> 'It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and

the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precautions.

* * * * * * * *

'The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and **conflict** with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.' " (124 U.S. 465 at 481, 482.)

Your Honorable Court has consistently stated that "when public safety and health are concerned", Congressional intention to displace local laws is not to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. *Maurer v. Hamilton,* 309 U.S. 598, 614 (1939).

In a series of recent cases your Honorable Court has set forth the rules to be applied on the question of preemption. For example, in the case of *Colorado Anti-Discrimination Commission et al. v. Continental Air Lines, Inc.,* 372 U.S. 714, 83 S. Ct. 1022 (1963), your Honorable Court held that the Colorado Supreme Court was *in error*

in holding that the Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958, had pre-empted state legislation on the same subject, the protection of people flying in interstate commerce from racial discrimination. Your Honorable Court held in that case (which is almost on all fours with the instant case) that the Colorado Supreme Court was in error and that it had not applied the proper rules of interpretation. More particularly your Honorable Court pointed out that so long as any Federal power may remain "dormant and unexercised", it will not frustrate any part of the purpose of the federal legislation, and that state laws on the subject can stand. The majority opinion of the Pennsylvania Supreme Court overlooked this doctrine and hence came to a wrong conclusion. This case being very apropos of the instant case, we quote the following discussion on the question of supersession (372 U.S. at 722 et seq.) (footnotes omitted):

> "Continental argues that federal law has so pervasively covered the field of protecting people in interstate commerce from racial discrimination that the States are barred from enacting legislation in this field. It is not contended, however, that the Colorado statute is in direct conflict with federal law, that it denies rights granted by Congress, or that it stands as an obstacle to the full effectiveness of a federal statute. Rather Continental argues that:
>
> 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'

"But this Court has also said that the mere 'fact of identity does not mean the automatic invalidity of State measures.' To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here."

* * * * * * * * *

"The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much which has been exercised by regulations. Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938 and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation."

Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 431, 83 S. Ct. 1759 (1963) is to the same effect. For example, the Court there said as follows (374 U.S. 429-430):

"In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to the broad statements about the 'Comprehensive' nature of federal regulation under the Federal Communications Act. The

'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case.' Statements concerning the 'exclusive jurisdiction' of Congress being the only controversial question: whether Congress intended to make its jurisdiction exclusive. People of State of California v. Zook, 336 U.S. 725, 731, 69 S. Ct. 841, 844, 93 L. Ed. 1005. Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 10-13, 58 S. Ct. 87, 82 L. Ed. 3. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 141, 83 S. Ct. 1210, 1217."

"Finally, there has been no showing of any conflict between this state law and the federal regulatory system, or that the state law stands as an obstacle to the full effectiveness of the federal statute. No specific federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it. As in Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, at 724, 83 S. Ct. 1022, at 1027, we are satisfied that the state statute 'at least so long as any power the [Commission] may have remains "dormant and

unexercised," will not frustrate any part of the purpose of the federal legislation.' "

In the recent case of *Brotherhood of Locomotive Engineers et al. v. Chicago, Rock Island and Pacific Railroad Co. et al.*, 382 U.S. 423 (1966) this Court reversed the lower court which had found that the Arkansas law would frustrate and present an actual conflict with the Federal Arbitration Act. The three-judge District Court held that the parties could not comply both with the State law and the arbitration award. Nonetheless, the Supreme Court held that there was no supersession on the ground that there was no impasse in the collective bargaining process in those states which had the Full Crew Act. The U. S. Supreme Court found no intention to supersede the Full Crew Act laws. This case again shows the overall perspective that the Court is taking in supporting state action.

In the case of *Huron Portland Cement Company, etc. v. City of Detroit, Michigan, etc. et al.*, 362 U.S. 440 (1960) your Honorable Court again upheld state legislation concerning the inspection of boilers in interstate vessels in accordance with state standards, even though such boilers were approved by the federal agency involved. The Court upheld the state legislation and threw out the caveat that *courts* are not to seek out ". . . conflicts between state and federal regulation where none clearly exists" (362 U.S. 446).

The Supreme Court of Pennsylvania's decision not only eliminates flagging in Pennsylvania where there may be existing automatic block systems and manual block systems but also eliminates flagging where there are neither automatic nor manual controls in effect. Certainly

the order of the Supreme Court of Pennsylvania as to areas where there are no mechanical devices in effect goes far beyond any such conflicts with the Federal government. There clearly can be no supersession in areas where there are no Section 25 devices in effect. For the most part this constitutes the majority territory of the trains operating in any railroad system.

The Pennsylvania Public Utility Commission order in this case applies in all situations where a train on one track may be overtaken by another train on the same track. This could happen in an area where there are no automatic or manual devices in effect. This again, highlights the error of the reasoning of the Pennsylvania Supreme Court in saying that the mechanical device performs the exact same function as flagging. Both should exist for the safety of the public.

The decision in the instant case ignores the fact that Congress only entered the field of safety in very specific and limited situations and that the exercise of power generally resides with the States. A State should not be held to be powerless to cope with its safety problems.

It cannot be said that Congress has taken the entire subject matter of rear-end collisions in hand to the exclusion of state regulation; but only the installation of certain mechanical devices. This is pointed up by the fact that originally the Act of 1920 only applied to automatic devices and hence other devices were still within State control. See *International-Great Northern Railroad Company and Ewing Norwood and A. F. Fisher v. Railroad Commission of Texas*, 275 U.S. 503 (1927), affirming per curiam, 281 S.W. 1084 (Dec. 1926). In that case the State of Texas was held to have authority over

an interlocking device where lines of rail crossed each other in the City of Houston, Texas.

With the amendment of 1937, State jurisdiction over interlocking devices may now be superseded. Until the federal government actually seeks to move into a certain area of safety, state regulation must still remain.

This Court has recognized the necessity and importance of flagging under state control. For example, in *Smith v. State of Alabama,* 124 U.S. 465, 481, this Court listed among safeguards or precautions encompassed within the limits of local law:

> "The placing of watchmen and signals at points of special danger."

The Court said these things are

> ". . . strictly within the limits of the local law. . . ."

In *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U.S. 548, 560, this Court again recognized that the state may require railroads

> ". . . to have flagmen precede them to warn persons of their approach. . . ."

In *Nashville, Chattanooga & St. Louis Railway v. White, Administrator et al.,* 278 U.S. 456, Justice Holmes recognized that electric signals did not supplant flagmen and the State Court properly held the railroad negligent in failing to comply with an ordinance of the City of Memphis requiring all railroads on every street crossed by their trains to keep a flagman constantly on duty. He noted that the State could justifiably require a flagman in addition to electric devices for regulating traffic. Jus-

tice Holmes noted that even though electrical devices are more certain and should be adopted, a state is not to be condemned in imposing the requirement of a flagman to assist.

Many States and commissions which have dealt with flagging, have all uniformly recognized the question as a matter to be handled by the States and not by the Federal government. See the excellent decision of the highest Court of the State of New Jersey, *In re: Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, etc., The Pennsylvania Railroad Company and Pennsylvania Reading Seashore Lines v. Board of Public Utility Commissioners, Department of Public Utilities and Brotherhood of Railway Trainmen et al.*, 49 N.J. 174, 229 A. 2d 505 (1967).

The State of Maryland has also issued a decision in which it has considered flagging to be a matter for State jurisdiction. See *Brotherhood of Railroad Trainmen v. Baltimore and Ohio Railroad Company*, 238 A. 2d 516 (1968). Although the decision was 4 to 3, the Maryland Court affirmed the lower court which permitted the railroad to discontinue flagging except in certain limited situations. The Circuit Court, Baltimore City, indicated the requirements for the railroads to continue flagmen as set forth in the footnote.[1]

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[1] "Understandably, one's initial reaction to a proposal to eliminate a safety factor of long standing is to view it with considerable doubt and scepticism. After a careful consideration of all the evidence, however, it is the opinion of this Court that the evidence produced by the Brotherhood, as the complainant before the Commission, did not meet the required burden of proof. A close scrutiny of the record indicates that the preponderance of evidence, on the contrary, shows that the automatic block signal system, and Pennsylvania's manual block signal system (when

In addition to these states, the State of Delaware has taken jurisdiction of flagging, in a similar case. For example, see *Public Service Commission of the State of Delaware.* (Docket 440). The Illinois Public Service Com-

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Pennsylvania's Rule 316 is in effect) as well as the proposed B & O rule, are as infallible as can be humanly devised, and that any possible errors on the part of the engineers of the following trains, such as the failure to observe a signal, might well be encouraged by a mandatory requirement of flagging. Moreover, the record shows that Pennsylvania's number of rear-end collisions has actually decreased, rather than increased, since October 18, 1964, when its Rule 99 was last amended. The safest system, of course, would be the installation of two-way radio contact between the dispatcher and the engineers of all trains under his signal supervision. It is surprising, in this advanced electronic age, that the railroads have not inaugurated such a system, the cost of which would probably be only a fraction of the losses resulting from a serious but avoidable accident.

The holding in this case is subject to two exceptions which are apparent from the record before the Commission. These exceptions are as follows:

1. The Pennsylvania rules provide that the following train, after the engineer has received a signal of an obstruction ahead, must operate at 'restricted speed'—i.e., 'not exceeding 15 miles per hour prepared to stop short of . . . obstruction'. As the evidence before the Commission shows that the following train, even moving at 'restricted speed' cannot always be stopped at this speed short of an obstruction, due to the curvature or grade of the tracks or weather conditions, the rules should be amended to require the engineer of the following train to proceed at a 'reduced speed' and always be prepared to stop within the range of the engineer's forward vision.

2. The flagging requirements should be fully complied with to give protection to the following train, where the crew of the front train has knowledge of emergency conditions (such as a defective rail) affecting the safety of the following train, when such conditions are such that the engineer of the following train is not required to know or to anticipate on the basis of signals, train orders, rules, or otherwise.''.

mission has also taken jurisdiction. (Case No. 5097). West Virginia Public Service Commission has taken jurisdiction in a similar case (Case No. 6024). In all of these cases, not one Commission nor State Court has ruled in agreement with the Pennsylvania Supreme Court's ruling in this case, viz., that Section 25 of the ICC Act has superseded all state jurisdiction concerning flagging.

It may also be noted from this record that the Honorable Robert W. Ginnane in correspondence with the parties indicated that Section 25 of the ICC Act has never been construed by the ICC as including flag protection, and no regulations have ever been issued by the ICC or the Department of Transportation concerning this matter. The Honorable Robert W. Ginnane indicated that the ICC decision in Order No. 29543, dealt with the question of flag protection only as a "permissive requirement" to allow such movements. Mr. Ginnane indicated that the Commission has never construed flagging to be one of the safety appliances nor a "system" or "method" under Section 25.

H. R. Longhurst, for the Department of Transportation, also indicated in his letter ". . . that the manner in which flag protection is provided is an operating matter over which we do not exercise jurisdiction." With all of these individuals in the field taking the position they have, it is hard to understand how the Pennsylvania Supreme Court can take the position it has.

CONCLUSION

Certiorari should be granted in this case to correct an error of the decision of the Pennsylvania Supreme Court and also to prevent substantial danger from occurring to the public by the acceptance of the proposition that the States of this Nation are without jurisdiction to require flagging in areas both inside and outside of Section 25 devices. The decision in this case, if allowed to stand, would greatly endanger the safety of the public. The decision of the Pennsylvania Supreme Court would have the effect of rendering obsolete and invalid flag requirements which have been in effect in many states throughout the United States for many years.

Wherefore, it is respectfully requested that our Petition for Certiorari be granted and that the matter be set down for plenary consideration of the facts.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 32 May Term, 1968

Bessemer and Lake Erie Railroad Company,
Appellants

vs.

Pennsylvania Public Utility Commission

Reported at 430 Pa. 339 (1968)

I.

OPINION

By Mr. Justice Roberts, May 21, 1968:

With the advent of mechanical devices for controlling the movement of more than one train on a single track, many railroads in Pennsylvania have abandoned the old system of flagging, whereby a man was dispatched to the rear of a halted train to place flares and wave flags, thus insuring against rear end collisions. The

abandoning of the flaggers forms the basis of this controversy.

On July 22, 1964, a union filed a complaint before the Pennsylvania Public Utility Commission against the Pittsburgh and Lake Erie R. R. Co., alleging that the railroad had amended its rule 99 to eliminate flagging in those areas controlled by automatic signal devices, that this amendment has resulted in an unsafe warning procedure, and that the interests of public safety required that the commission order the railroad to reinstate its flagging controls. In October of the same year, the same union filed a "petition" against all railroads operating in Pennsylvania, including the P. & L. E., alleging that other railroads have also eliminated flagging, and urging the Commission to promulgate a rule to require flagging in *all* areas where a train stops under circumstances in which it may be overtaken by another train. As a result of these two actions, the commission heard extensive testimony by experts from both the union and the railroads, and, as a result of this testimony, issued its Rule 16 on November 22, 1965, requiring flagging in all areas, subject to certain exceptions dealing with passenger train stops, interlocking plants, storage yards, and those semi-automatic signal systems in which oncoming trains are required to come to a complete stop. The railroads immediately took an appeal to the Superior Court.

Before argument could be heard, the union and the commission successfully petitioned the Superior Court to remand the case for further hearing on the ground that many of the Rule 16 exceptions were unclear. As a result of this remand, a new, amended version of Rule 16 was issued on December 19, 1966; this new rule con-

tains no specific exceptions to the flagging requirements. In an opinion by President Judge Ervin, the Superior Court affirmed the commission's order. 210 Pa. Superior Ct. 7, 232 A. 2d 220 (1967), and we granted allocatur, limiting argument, however, to the issue of whether §25 of the Interstate Commerce Act, 49 U.S.C. §26,[1] has pre-

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[1] Section 25 of the Interstate Commerce Act provides in pertinent part as follows:

"*Order to install systems, etc.; modification; negligence of carrier*

"(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, *and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation* which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad such order to be issued and published a reasonable time (as determined by the Commission) in advance of the date for its fulfillment: *Provided,* That block signal systems, interlocking, automatic train stop, train control, and cab-signal devices in use on August 26, 1937, or such systems or devices hereinafter installed may not be discontinued or materially modified by carriers without the approval of the Commission: . . .

"*Filing report on rules, standards, and instructions with Commission; time; modification*

"(c) Each carrier by railroad shall file with the Commission its rules, standards, and instructions for the installation, inspection, maintenance, and repair of the systems, devices, and appliances covered by this section within six months after August 26, 1937, and, after approval by the Commission, such rules, standards, and instructions, with such modifications as the Commission may require, shall become obligatory upon the carrier: *Provided, however,* That if any such carrier shall fail to file its rules, standards, and instructions the Commission shall prepare rules, standards, and instructions for the installation, inspection, maintenance, and repair of such systems, devices, and appliances to be observed by such carrier, which rules, standards, and instructions, a copy thereof having been served on the president, chief operating of-

empted state regulation dealing with flag protection. Having thoroughly reviewed the applicable statutes and judicial precedents, we hold that federal legislation *has* preempted any state intervention in this particular area, a holding supported by three separate reasons.

First, there can be no doubt whatsoever that the mechanical devices specifically required by §25 perform the *exact same function* that manual flagging is intended to perform (i.e., increasing safety by preventing rear end collisions); second, the language used in §25 is broad enough to indicate that Congress has chosen to regulate the entire field of rear end collision prevention; and third, the Supreme Court of the United States has announced the rule that where federal language is broad enough to indicate preemption, a state law cannot escape interdiction on the ground that it does not *conflict* with the federal regulations actually passed.

The first reason for our decision today, that §25 devices perform the same function as flagging, needs little expansion. What is *most* significant about this identity of functions, however, is this. If one looks behind the actual mechanical devices themselves, §25 is really nothing

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ficer, trustee, or receiver, of such carrier, shall be obligatory: *Provided further,* That *such carrier may from time to time change the rules, standards, and instructions herein provided for, but such change shall not take effect and the new rules, standards, and instructions be enforced until they shall have been filed with and approved by the Commission:* And provided further,* That the Commission may on its own motion, upon good cause shown, revise, amend, or modify the rules, standards, and instructions prescribed by it under this subsection, and as revised, amended, or modified they shall be obligatory upon the carrier after a copy thereof shall have been served as above provided." (Emphasis marked "*" supplied.)

more than a federal statute designed to keep one train from running into the rear of another. Congress having once determined how best to avoid this type of disaster, it is no longer open to the states to decide that the federal protections are inadequate, and that additional safety measures must be taken by interstate railroads whenever their trains run through Pennsylvania.

Furthermore, the language of §25 indicates that the Interstate Commerce Commission (now the Department of Transportation [D.O.T.])[2] has the power to require flag protection to supplement the safety features of mechanical collision prevention devices. In addition to requiring those types of automatic devices set out in the opening sentence of §25(b), the Commission may also require "other similar appliances, methods, and systems intended to promote safety of railroad operation. . . ." The argument advanced by appellees that the §25 language is limited only to mechanical devices, whereas flagging cannot be classified as a device at all, falls flat in the face of this language. For the statute, in addition to permitting the Commission to require "appliances" not specified in the statute itself, also permits the establishment of additional "methods and systems" to prevent rear end collisions. Flagging can certainly be classified as either a "method" or a "system."

Admittedly, neither the ICC nor the DOT has ever issued any blanket regulations pursuant to §25 covering flag protection. However, not only is the federal agency's failure to regulate flagging itself not dispositive when

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[2] On April 1, 1967 all railroad safety regulations formerly administered by the I.C.C. were placed under the aegis of the Department of Transportation, Federal Railroad Administration.

the issue of preemption is raised, see cases cited and discussed infra, but furthermore, the ICC, in 1947, *did* issue an order requiring railroads under certain specified circumstances to supplement their automatic controls with flag protection. See Order No. 29543, issued pursuant to Appliances, Methods, and Systems Intended To Promote Safety of Railroad Operation, 268 I.C.C. 547, 560-61 (1947).[3]

It is certainly too late in the development of constitutional law to say that Congress may not preempt an entire field by the passage of a broad based statute, even though the regulations passed pursuant to that statute do not in fact cover every possible situation. Moreover, once such a statute is passed, and the intention to pre-

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[3] Order No. 29543 requires all Class I and all switching and terminal railroads subject to the Interstate Commerce Act to install either automatic or manual block control systems on those parts of the lines where passenger trains operate at more than 60 mph, or where freight trains operate at more than 50 mph. The order further requires that if the manual block control system is used it shall be supplemented by flag protection whenever a passenger train is admitted to a block occupied by another train, or a passenger train occupies a block into which any other train seeks entry.

The Department of Transportation, by two letters dated July 6, 1967 and July 31, 1967, informed counsel for appellant railroads that this order is still in effect, and was adopted on April 1, 1967 by the Federal Railroad Administration. Prior to that date, the order had been followed in two cases. See *In the Matter of Application for Approval of Proposed Modifications of Systems or Devices under Paragraph (b), Section 25 of the Interstate Commerce Act, as amended* (Pennsylvania Railroad Company), 293 I.C.C. 765, 768 (1954); *In the Matter of Application for Approval of Proposed Modifications of Systems or Devices under Paragraph (b), Section 25 of the Interstate Commerce Act, as amended* (Pennsylvania-Reading Seashore Lines), 298 I.C.C. 503, 506 (1956).

empt state law in the area becomes manifest, the various states may not pass legislation even supplemental to the federal rules, so long as the area affected by these supplemental acts coincides with the federal bailiwick. For example, in Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 47 S. Ct. 207 (1926), two state statutes which required automatic fire doors and cab curtains on locomotives were declared unconstitutional on the ground that the federal Locomotive Boiler Inspection Act was the exclusive pronouncement on mandatory locomotive equipment. No one in Napier contended that the federal act actually *had* any provisions relating to such cab curtains and fire doors. The Supreme Court nevertheless held that the states were powerless to supplement the federal equipment requirements with additional safeguards of their own. The appellee in the present case attempts to distinguish Napier by relying on In Re Complaint of Brotherhood of R.R. Trainmen v. Public Utility Commissioners of New Jersey, 49 N.J. 174, 229 A. 2d 505 (1967). However, in our view, New Jersey's explanation of Napier is unsatisfactory.

According to the Brotherhood decision, Napier does not control because it dealt with equipment actually attached to the locomotive and passing from state to state, rather than with a requirement styled by the New Jersey Court as a "supplemental local emergency safety device." We believe this to be a distinction without legal substance. Just as in the present case, an attempt was made in Napier to show that the state law was aimed at a completely different evil than that covered by the Boiler Inspection Act. It was there contended that the federal locomotive requirements were intended to keep trains from having accidents, whereas the local fire door and cab curtain statutes were designed for engineer health and safety.

That argument failed to persuade the Supreme Court of the United States. So also is this Court unmoved by an argument based on the purely "supplemental" nature of flagging. In fact, it would seem that Napier is a much *weaker* case for a finding of federal preemption than this insofar as the state statute there *was* intended to remedy a different problem than the federal law, whereas in the present case, the appellee's best argument is that flagging "supplements" automatic devices.

Finally, on this issue of supplemental state legislation, we shall follow the case of Pennsylvania R. Co. v. Public Service Commission of Pennsylvania, 250 U.S. 566, 40 S. Ct. 36 (1919). Pennsylvania had enacted a statute requiring cabooses to be equipped with rear platforms of certain minimum dimensions, even though the applicable federal statute permitted cabooses with no such platforms. In answer to the argument that the Pennsylvania statute merely "supplemented" the federal law by making cabooses safer, Mr. Justice Holmes had only to say: "when the United States has exercised its exclusive powers over interstate commerce as far as to take possession of the field, the States no more can supplement its requirements than they can annul them." 250 U.S. at 569, 40 S. Ct. at 37.

Agreeing with this great Justice, and believing that his words are just as applicable to the present case, we reverse the orders of the Superior Court and Public Utility Commission.

Dissenting Opinion by Mr. Justice Musmanno:

The Majority Opinion hitches the wagon of its argument to the star of Oliver Wendell Holmes by quot-

ing the illustrious jurist who said: "When the United States has exercised its exclusive powers over interstate commerce as far as to take possession of the field, the States no more can supplement its requirements than they can annul them."

This is epigrammatic, it is brilliant,—but it is untrue.

It is untrue that, by providing an additional measure of safety to a dangerous situation, the original forces of safety are annulled. Thus, I cannot go along with the Majority's reasoning that because Justice Oliver Wendell Holmes said something some fifty years ago, life and limb on the railroads of Pennsylvania should be denied the protection proclaimed by the sovereign state of Pennsylvania.

I bow to no one in my admiration for Justice Oliver Wendell Holmes. There is no question that in the constellation of juristic eminence his star is a bright one indeed, but no jurisprudential astronomer has asserted that it was a star that shone all the time with impeccable infallibility. I personally know of an occasion when that luminary failed to scintillate with the sapient effulgence assigned to it by the Majority Opinion. I was one of the attorneys in the Sacco-Vanzetti case who called on Justice Holmes at his home in Beverly, Massachusetts to ask that he sign a stay of execution of the two doomed men. I had filed in the Supreme Court of the United States in Washington a petition for a writ of certiorari addressed to the Supreme Court of Massachusetts, averring that the two defendants had been denied due process of law under the Constitution of the United States. Holmes refused to

sign the stay, saying that the Federal government had no right to interfere in a purely state matter. His loyalty to Massachusetts and his instinctive wish that this grand old State should not be declared wrong before the eyes of the world, which had taken the Sacco-Vanzetti case to its heart, would not permit him to rise to the magnificent courage he had displayed in the case of Frank v. Magnum, 237 U.S. 309. In that *cause celebre* he had denounced the State of Georgia for allowing Leo Frank to be tried in an atmosphere of menace which dominated the deliberations of the jury. Holmes admitted that Sacco and Vanzetti had been tried in the same kind of hostile atmosphere: "It was their (Sacco's and Vanzetti's) misfortune to be tried in a community that was stirred up, if not frightened, by manifestations . . . and . . . I presume that the jury felt like the community."

Nevertheless, his chauvinistic pen remained in its holder when I, with my brother attorneys, presented the petition for the stay of execution to him, and thus two ill-treated working men were denied a review, to which they were entitled, in the Supreme Court of the United States. Three other justices must share the blame with Justice Holmes in this failure of justice.

Accordingly, in spite of my never-diminishing admiration for Justice Holme's brilliant and historical career, I cannot bring myself to regarding him omniscient. Even Homer nodded and it is clear Holmes nodded in the Sacco-Vanzetti case. It is also apparent that a little drowsiness crept into his pen when he wrote the utterance which the Majority quotes with the assurance that seems to say that, once Holmes has spoken on a subject, all fountains on that theme may as well dry up. In point of fact, the well of

state constitutional sovereignty did not empty with Holmes's pronouncement, or anybody else's pronouncement. The reservoir of state police power to protect the lives of the population within its borders has not drained simply because the Federal Government has legislated on the subject of railroads.

The Supreme Court of the United States acknowledged this fundamental truism in Federal-State relationship, when it said in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440: "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce,' . . . never intended to cut the States off from legislating on all subjects relating to *the health, life, and safety of their citizens,* though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may effect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." (Emphasis supplied.)

In Head v. New Mexico Board of Examiners, 374 U.S. 424 the issue for decision was whether the state of New Mexico could regulate advertising on radio in view of the Federal Communications Act. The Supreme Court said: "Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce . . . Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the

statute thus falls within the most traditional concept of what is compendiously known as the police power."

The case we are considering here has to do with safety on the railroads. About the most fundamental rule that can be considered on proper railroad operation is the one that says there cannot be, and there must not be, two railroad trains or locomotives on the same stretch of track at the same time. This superlatively hazardous situation was immortalized in the ballad of Casey Jones, whose most telling stanza dramatically relates:

> "Casey pulled up that Reno Hill,
> He tooted for the crossing with an awful shrill,
> The switchman knew by the engine's moan,
> That the man at the throttle was Casey Jones.
> He pulled up within two miles of the place
> Number Four stared him right in the face.
> He turned to the fireman, said 'Boy, you'd better jump,
> 'Cause there's two locomotives that's a-goin' to bump.'"

And the locomotives did bump. And Casey Jones went on to everlasting renown with the ever-recurring refrain:

> "Casey Jones, two locomotives,
> Casey Jones, that's a-goin' to bump,
> Casey Jones, two locomotives,
> 'There's two locomotives that's a-goin' to bump.'"

It is to prevent the bumping of locomotives or trains on the same track that a system of flagging has developed on the railroads of the nation. In the early part of 1964 certain railroads in Pennsylvania initiated a program to

eliminate flagging. On July 22, 1964, the Railroad Brotherhoods, acting through some of its members, filed a complaint with the Pennsylvania Public Utility Commission, protesting the elimination of flagging protection and asking that the commission order the reinstitution of "adequate and proper flag protection." Specifically the complaint asked that the commission require flagging protection "when a train stops under circumstances in which it may be overtaken by another train, regardless of whether or not such train or trains are operating under locomotive cab, automatic block or manual block signal system rules."

Fourteen railroad systems in Pennsylvania filed answers denying that there was any necessity for the flagging system, insisting that the automatic devices now in operation met the requirements of safety. The commission sat for many days taking testimony, which, in the printed record, covers some 2,000 pages. The commission found and so declared that the elimination of flag protection jeopardized the safety of the public and railroad employees. It accordingly ordered that "When a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail and when necessary, in addition, display lighted fusees."

The railroad companies appealed to the Superior Court which affirmed the order of the commission, stating in its opinion that: "We do not exercise our independent judgment but only look to see whether the commission's findings are supported by substantial competent evidence."

The Superior Court found that the commission's findings were justified by the evidence. The railroads petitioned this Court for allocatur which was granted.

The railroads here ask that the order of the Pennsylvania Commission be vacated on the basis that Congress has, under the Interstate Commerce Act, preempted the field of train protection so as to preclude state regulation on flagging protection. Of course, we are bound, as the Superior Court was, to accept the facts as found by the commission.

In view of the factual situation declared by the commission I do not see how the Majority can conclude that the law requires a reversal of the Superior Court and the commission. Such a reversal means a Casey Jones collision with the decision of the Supreme Court of the United States in Brotherhood of Locomotive Eng. v. Chicago, R.I. & P.R. Co., 382 U.S., where the high court declared: "Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional legislation on that subject, however, the *States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public.*" (Emphasis supplied).

In Southern Pacific Co. v. Arizona, 325 U.S. 761, the Supreme Court also said: "There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

How can flagging by reducing possibility of accidents restrict the free flow of commerce across state lines or interfere with it in any way?

The Majority Opinion states that "there can be no doubt whatsoever" that the mechanical devices specifically required by §25 (of the Interstate Commerce Act) perform the exact same function that manual flagging is intended to perform." The answer to this statement is that there is no doubt whatsoever that the Interstate Commerce Act does *not* perform the functions manual flagging performs. The evidence presented before the Pennsylvania Commission proved conclusively that, with the mechanical devices, accidents occurred which would not have happened had there been flag protection.

The Majority makes no reference to the evidence in this case which, as I have already stated, covers some 2,000 pages. The Majority seems to gloss over the whole purpose of these proceedings. The Railroad Brotherhoods specifically pointed out how in the mountainous and habitually foggy areas which make up a large portion of the railroad areas in Pennsylvania, instantaneous flag protection is required if trains are to be brought to a stop, and this is particularly true because of trains of the Pittsburgh & Lake Erie and the Baltimore & Ohio Railroad "using the same tracks, which, in many cases have the view obscured by hills and curves."

The Brotherhoods produced evidence to substantiate their complaint that: "Any reliance by the railroad upon Automatic Block Signal Systems or other automatic devices is ill-conceived and ill-advised, as experience has shown that such devices cannot always be relied upon to

prevent accidents of the type which the flagging rule is intended, and over the years has, actually prevented,"

Automatic signalling by the use of track circuits first developed in 1872. The underlying principle of track circuiting is its capacity to detect and register the presence of a train, engine, or car on a track. The circuits are also designed to detect a broken rail, an open switch, or an unclosed drawbridge. Automatic track signalling systems are designed on a "fail-safe" principle, whereby a break in or shunting of a track circuit will actuate a restrictive signal aspect.

This is all well and good but the evidence at the hearings in this proceeding revealed that at times deposits of foreign matter, such as sand, rust and grease on rails or on an engine or car wheels interfere with the intended circuit shunting. Undesired electrical connections between control circuits of associated signals may cause "false-proceed" signal aspects to be displayed and, in addition, certain lightweight track maintenance and inspection equipment will not ordinarily shunt track circuits.

The Superior Court, in reviewing the evidence submitted to the commission, stated that: "Automatic signal malfunctions may result in a 'false-proceed' signal, or a 'false-restrictive' failure, the latter involving a more restrictive signal aspect than is warranted by track conditions. I.C.C. records showed 58 false proceed failures in the United States on all railroads in 1964, while the Penna. R. R. reported 2,422 false restrictive failures on its system in one year. The Commission found that the elimination of flag protection jeopardizes the safety of the public and railroad employees and that flag protection *augmenting*

that furnished by signals, was essential, whether the signals were manual or automatic."

Many witnesses testified to difficulties encountered with the automatic signal system. One telegraph operator, with 14 years experience stated that on three occasions, enginemen had difficulty reading a signal which displayed a red or stop block indication, "having interpreted the signal as displaying a yellow or restricting indication and on one occasion the train was operated beyond the signal, causing the engine to run through a switch." It was discovered later that the sun's rays had been responsible for the "misreadings" and a longer hood had to be attached to the signal to shield the color light from the sun.

Another witness related an experience where "two controlled interlocking signals governing separate tracks at McKeesport displayed signal indication which were not properly reflected on the tower operator's panel board due to a malfunctioning of the signal system."

The phenomenal, almost miraculous development in the mechanical world, is leading many to believe that wheels, nuts, screws and bolts are more reliable than the senses of human beings. But from time to time airplane crashes, railroad wrecks and ship sinkings shock contemporary society into an awareness that insensate mechanics have not yet displaced homo sapiens. An official report of the Department of Transportation (which has now supplanted the Interstate Commerce Commission) recently gave graphic illustration how the failure to use manual flag protection caused the death of one railroader and serious injury to another. The report states: "On November 18, 1966, a rear-end collision occurred between two Terminal Railroad Association of St. Louis freight trains at St. Louis,

Mo. *One employee was killed and one was injured.* The accident was caused by improperly permitting a train to enter an occupied manual block under a Clear manual block-signal indication, *failure of the carrier to arrange for adequate flag protection to the rear of the preceding* train, and failure of the engineer and conductor to operate the following train under control as required." (Emphasis supplied.)

The six printed volumes of testimony and exhibits in this case tell of many deficiencies in the mechanical signal system, all of which the Majority ignores, preferring to deal with theory rather than realities. I regret to say that it is my belief the Majority Opinion does not come to grips with the real problem in the litigation before us which has to do with the most momentous proposition on earth, namely, the preservation of human life. The Majority Opinion scarcely ever acknowledges that vital feature in the controversy between the railroad companies and the railroad Brotherhoods.

One can never, or should never, fail to realize that railroading is an extra-hazardous occupation. Fortunately and gratefully we recognize that railroad tracks are not the gory battlefields they once were, my father and two of my brothers having been railroaders. Still we cannot overlook that, with all the safety devices current, potential slaughter, maiming and crippling still stalk the ties and rails. We still look with sorrow on pictures in newspapers and on television screens of trains which have telescoped, of locomotives overturned, of blanketed forms lying on the ground, and ambulances clanging away carrying the injured and the disabled from railroad wrecks. Thus, every possible protection which can stave off these heart-

rending events should be welcomed by the railroads, not opposed.

The Majority Opinion says that "there can be no doubt whatsoever that the language of §25 indicates that Congress has chosen to regulate the entire field of rear end collision preventing." The answer is that there is nothing in §25, or any other part of the Interstate Commerce Act, which imposes any obligation to provide flag protection. Congress, by limiting its control over collisions to block signal, interlocking, automatic train stop, train control and cab-signal systems, has left the requirement of manual flag protection, where it has been since the first railroad was built, exclusively to the States.

The Majority Opinion states that, once Congress has decided how best to avoid one train from running into another, "it is no longer open to the States to decide that the Federal protections are inadequate." But it is not a matter of States determining inadequacy on the part of the Federal government. It is a matter of a State discharging its constitutional duties to offer the utmost safety to its people. The United States does not have authority over a single square inch of territory in the States which it does not get from the Federal Constitution or laws passed thereunder. The Supreme Court of the United States said in Rice v. Santa Fe Elevator Corporation, 331 U.S. 218: "We start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Thus, when Federal legislation says nothing about flag protection and there is no evidence that flag protection can do other than help to prevent train collisions, it

is folly to argue that the State must allow carnage on the railroad tracks when it has the means to avert it.

Since Congressional legislation does not prohibit flag protection, the railroads would, in order to maintain their position, have to prove that flag protection interferes with the mechanical devices or in some way renders them ineffective or less protective. There is nothing in the voluminous record to support any such bizarre conclusion. Why, then, deny to Pennsylvania the right to help in saving the lives of its citizens?

Then, the Majority says that since, under §25, the Interstate Commerce Commission may also require "other similar appliances, methods and systems intended to promote the safety of railroad operation," this means that it could, if it wanted to, require flagging. What it could or could not do is not the issue in this case. The fact is that Federal legislation or regulation does *not* provide for flag protection. To argue that Congress could provide for flag protection is like saying that it could also provide for additional fire engines after a conflagration has levelled a city in which a federal installation is located.

We are here dealing with realities, not theories; with danger on the railroad tracks, not abstractions in a philosopher's study.

The Majority founds its whole case on preemption. Preemption means monopoly and monopoly is a serious proposition. To say that the Federal Government with its limited, derived powers may monopolize a subject against the unlimited powers of the sovereign states is to make a monumental assertion. Of course, there is preemption, and there must be preemption, in certain fields under our dual

form of government. However, where preemption is asserted it cannot be implied, it must not be left to interpretation, much less surmise. The Majority Opinion does not deny that preemption on flagging protection by the Federal Government is not spelled out in the Interstate Commerce Act. In fact, it is not even mentioned.

In Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, the Supreme Court stated: "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, *it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.*" (Emphasis supplied) There is nothing in the language of §25 which is inconsistent with the employment of flagging by the State in order to further carry out the objectives of both Pennsylvania and the United States to save life. Why then does the Majority insist on thwarting Pennsylvania legislation?

The United States District Court for the Eastern District of Louisiana said in the recent case of Pearce v. Freeman, 238 F. Supp. 947, that "If it (Congress) chooses to circumscribe its regulations and occupy only a limited area in a given field, it leaves to the states the right to regulate outside of that limited area."

In Locomotive Engineers v. Chicago, R.I., U.S. , 34 Law Week, 4109, the Supreme Court said: "In the absence of congressional legislation on that subject, however, the *States have extensive power of their own to regulate in this field, particularly to protect the safety of* railroad employees and the public. (Emphasis supplied)

In the face of all these authorities, I cannot grasp the significance of the Majority decision. It insists on running

on the same track occupied by all the authoritative precedents I have here cited, and there are very many more. I see here a Casey Jones collision between law and arbitrariness. I see here a forcible exercise of judicial power which I fear may be the cause of accidents. Apart from the fact that I could be a passenger on one of the trains derailed and wrecked because of the absence of flagging protection, I feel content in the fact that I am not part of the wrecking crew working on dismantling the track of harmonious cooperation between the United States and the States.

Dissenting Opinon by Mr. Justice Cohen:

I disagree with the majority's conclusion that §25 of the Interstate Commerce Act, 49 U.S.C. §26 (1958), has pre-empted all state regulation in the area of flagmen protection in order to promote the local safety of railroad operation.

In support of federal pre-emption, the railroads and the majority opinion rely most heavily on Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 71 L. Ed. 432 (1926), where the United States Supreme Court struck down state requirements for cab curtains and automatic doors to fire boxes on the ground that Congressional enactment manifested an intention to occupy the entire field of locomotive equipment. The inapplicability of Napier to the instant situation has recently been decided by the Supreme Court of New Jersey in In Re Complaint of Brotherhood of R.R. Trainmen, Pennsylvania Railroad v. Public Utility Commissioners of New Jersey, 49 N.J. 174, 229 A. 2d 505 (1967). In deciding the identical issue presently before our Court, Justice Jacobs, writing for a unanimous New Jersey Court commented: "Napier has never been applied as broadly as the Railroads contend

(cf. Terminal R. Asso. of St. Louis v. Brotherhood of R. Trainmen, 318 U.S. 1, 4, 63 S. Ct. 420, 87 L. Ed. 571, 576 (1943); Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 766, 65 S. Ct. 1515, 89 L. Ed. 1915, 1922 (1945)); in any event it dealt, not with supplemental local emergency safety device, such as flagging, but with equipment attached to the locomotive which passes through from state to state and with respect to which the national interest in uniformity is vital and paramount. Similarly, the very Congressional language (49 U.S.C.A. §26(b)) points to the block signal systems themselves and to similar appliances where national uniformity is the concern rather than to local safety requirements which do not impair the design or sweep of the federal regulations.

"In Florida Line & Avocado Growers v. Paul, supra, the Supreme Court pointed out that federal regulation of a field in commerce should not be deemed preemptive of state power in the absence of persuasive reason—'either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' [Citations omitted.] And in Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co., supra, the Supreme Court, in upholding a state full crew law as against a claim of preemption, noted that in the absence of Congressional legislation as to what number of crew members, 'the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public.' 382 U.S., at p. 429, 85 S. Ct., at p. 597, 15 L. Ed. 2d, at p. 505. Indeed it may be said that state regulatory provisions having local safety as their objective are the least likely to be held preempted. [Citations omitted.]; see also Pennsyl-

vania Railroad Co. v. Dept. of Public Utilities, supra, where we stated that we were not convinced that there is merit to the Pennsylvania's contention 'that Congress has occupied the field of automatic block signals to the total exclusion of any state safety requirements bearing hereon.' " 14 N.J., at p. 434, 102 A. 2d, at p. 630.

While I recognize the supremacy of federal legislation in areas partially occupied by Congressional enactment, it is not always clear and at times most perplexing to determine whether it was the Congressional intent to occupy the entire area. In Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 91 L. ed. 1447, the Supreme Court of the United States enunciated the conflicting values and guidelines which must be assessed before determining questions of federal preemption. Justice Douglas, speaking for the majority of the Court remarked: "So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 71 L. ed. 432, 438, 47 S. Ct. 207; Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Bd., 315 U.S. 740, 749, 86 L. ed. 1154, 1164, 62 S. Ct. 820. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so persuasive as to make reasonable the inference that Congress left no room for the States to supplement it. [Citations omitted.] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Hines v. Davidowitz, 312 U.S. 52, 85 L. ed. 581, 61 S. Ct. 399. Likewise, the object sought to be obtained by the

federal law and the character of obligations imposed by it may reveal the same purpose. [Citations omitted.] Or the state policy may produce a result inconsistent with the objective of the federal statute. Hill v. Florida, 325 U.S. 538, 89 L. ed. 1782, 65 S. Ct. 1373. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the State and federal regulations collide." [Citations omitted.]

After carefully analyzing and evaluating the relevant considerations outlined in Rice, I am drawn to the conclusion that §25 of the Interstate Commerce Act does not preclude state regulation in the nature of flagmen protection.

Moreover, the majority opinion, in my view, misconstrues the language of §25 by concluding that the language used therein is broad enough to indicate that Congress has chosen to regulate the entire field of rear end collision prevention. Section 25 provides in pertinent part as follows: "(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation, which comply with specifications and requirements prescribed by the Commission *upon the whole or any part of its railroad . . . Provided further,* That a carrier shall not be held to be negligent because of its failure to install such systems, devices, appliances, or methods *upon a portion of its railroad* not included in the order, and any action arising because of an

accident occurring *upon such portion of its railroad* shall be determined without consideration of the use of such systems, devices, appliances, or methods *upon another portion of its railroad.*" (Emphasis supplied.)

The use of the language "upon the whole or any part of its railroad" indicates that Congress only intended to empower the Interstate Commerce Commission to regulate the installation of safety appliances, methods, and systems which have some physical connection with the actual railroad cars or its appurtenances. Section 25 in no way confers authority on the Commission to promulgate rules and regulations with respect to safety devices which are not affixed "upon the whole or any part of its (referring to the carrier) railroad." The result achieved by the majority today for all practical purposes renders the meaning and purpose of that language nugatory inasmuch as its interpretation of §25 ignores what I think was the obvious intent of Congress, i.e., to preclude state regulation with respect to equipment attached to the railroad where the need for national uniformity is most vital to the national interest.[1]

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[1] This construction of §25 is further substantiated by a reading of paragraph (e) under the Act which provides as follows: "It shall be unlawful for any carrier to use or permit to be used on its line any system, device or appliance covered by this section unless such apparatus, with its controlling and operating appurtenances, is in proper condition and safe to operate in the service to which it is put, so that the same may be used without unnecessary peril to life and limb, and unless such apparatus, with its controlling and operating appurtenances, has been inspected from time to time in accordance with the provisions of this section and is able to meet the requirements of such test or tests as may be prescribed in the rules and regulations provided for in this section."

What else could Congress have intended by its inclusion of the language "upon the whole or any part of its railroad" since it could have arrived at the same result reached by the majority of this Court by the simple method of excluding that language from the Act? For these reasons I would affirm the judgment of the Superior Court.

I dissent.

Mr. Justice Eagen joins in this dissenting opinion.

Based upon the foregoing, it is extremely difficult to understand how the majority of our Court could arrive at its conclusion. It seems so obvious that Congress only intended to permit the Interstate Commerce Commission to regulate certain equipment and/or mechanical devices and their appurtenances and never intended to include under this Act regulatory power with respect to flagmen protection. Every word used in paragraph (e) refers to some sort of mechanical device and not one word therein relates to or encompasses the manual waiving of flags to prevent rear end collisions.

SUPREME COURT OF PENNSYLVANIA
Middle District

II.
ORDER

July 15, 1968. Petition denied.

Per Curiam.

III.

PORTIONS OF INTERSTATE COMMERCE ACT

(No. 49 U.S.C. §26)

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§26. SAFETY APPLIANCES, METHODS, AND SYSTEMS—(A) DEFINITION OF CARRIER

The term "carrier" as used in this section includes any carrier by railroad subject to this chapter (including any terminal or station company), and any receiver or any other individual or body, judicial or otherwise, when in possession of the business of a carrier subject to this section: *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of a general steam-railroad system of transportation now or hereafter operated by any other motive power.

ORDER TO INSTALL SYSTEMS, ETC.; MODIFICATION; NEGLIGENCE OF CARRIER

(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad such order to be

issued and published a reasonable time (as determined by the Commission) in advance of the date for its fulfillment: *Provided,* That block signal systems, interlocking, automatic train stop, train control, and cab-signal devices in use on August 26, 1937, or such systems or devices hereinafter installed may not be discontinued or materially modified by carriers without the approval of the Commission: *Provided further,* That a carrier shall not be held to be negligent because of its failure to install such systems, devices, appliances, or methods upon a portion of its railroad not included in the order, and any action arising because of an accident occurring upon such portion of its railroad shall be determined without consideration of the use of such systems, devices, appliances, or methods upon another portion of its railroad.

FILING REPORT ON RULES, STANDARDS, AND INSTRUCTIONS WITH COMMISSION; TIME; MODIFICATION

(c) Each carrier by railroad shall file with the Commission its rules, standards, and instructions for the installation, inspection, maintenance, and repair of the systems, devices, and appliances covered by this section within six months after August 26, 1937, and, after approval by the Commission, such rules, standards, and instructions, with such modifications as the Commission may require, shall become obligatory upon the carrier: *Provided, however,* That if any such carrier shall fail to file its rules, standards, and instructions the Commission shall prepare rules, standards, and instructions for the installation, inspection, maintenance, and repair of such systems, devices, and appliances to be observed by such carrier, which rules,

standards, and instructions, a copy thereof having been served on the president, chief operating officer, trustee, or receiver, of such carrier, shall be obligatory: *Provided further,* That such carrier may from time to time change the rules, standards, and instructions herein provided for, but such change shall not take effect and the new rules, standards, and instructions be enforced until they shall have been filed with and approved by the Commission: *And provided further,* That the Commission may on its own motion, upon good cause shown, revise, amend, or modify the rules, standards, and instructions prescribed by it under this subsection, and as revised, amended, or modified they shall be obligatory upon the carrier after a copy thereof shall have been served as above provided.

INSPECTION BY COMMISSION PERSONNEL

(d) The Commission is authorized to inspect and test any systems, devices, and appliances referred to in this section used by any such carrier and to determine whether such systems, devices, and appliances are in proper condition to operate and provide adequate safety. For these purposes the Commission is authorized to employ persons familiar with the subject. Such persons shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. No person interested, either directly or indirectly, in any patented article required to be used on or in connection with any of such systems, devices, and appliances or who has any financial interest in any carrier or in any concern dealing in railway supplies shall be used for such purposes.

UNLAWFUL USE OF SYSTEM, ETC.

(e) It shall be unlawful for any carrier to use or permit to be used on its line any system, device, or appliance covered by this section unless such apparatus, with its controlling and operating appurtenances, is in proper condition and safe to operate in the service to which it is put, so that the same may be used without unnecessary peril to life and limb, and unless such apparatus, with its controlling and operating appurtenances, has been inspected from time to time in accordance with the provisions of this section and is able to meet the requirements of such test or tests as may be prescribed in the rules and regulations provided for in this section.

REPORT OF FAILURE OF SYSTEM, ETC., AND ACCIDENTS

(f) Each carrier shall report to the Commission in such manner and to such extent as may be required by the Commission, failures of such systems, devices, or appliances to indicate or function as intended; and in case of accident resulting from failure of any such system, device, or appliance to indicate or function as intended, and resulting in injury to person or property which is reportable under the rules of the Commission, a statement forthwith must be made in writing of the fact of such accident by the carrier owning or maintaining such system, device, or appliance to the Commission; whereupon the facts concerning such accident shall be subject to investigation as provided in sections 40-42 of Title 45.

DUTIES AND POWERS OF COMMISSION

(g) It shall be the duty of the Commission to see that the requirements of this section and the orders, rules, regulations, standards, and instructions made, prescribed, or approved hereunder are observed by carriers, and all powers granted prior to August 26, 1937, to the Commission are extended to it in the execution of this section.

PENALTIES; ENFORCEMENT

(h) Any carrier which violates any provision of this section, or which fails to comply with any of the orders, rules, regulations, standards, or instructions made, prescribed, or approved hereunder shall be liable to a penalty of $100 for each such violation and $100 for each and every day such violation, refusal, or neglect continues, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violations shall have been committed. It shall be the duty of such attorneys to bring such suits upon duly verified information being lodged with them showing such violations having occurred; and it shall be the duty of the Commission to lodge with the proper United States attorneys information of any violations of this section coming to its knowledge. Feb. 4, 1887, c. 104, Pt. I, §25, added as §26 by Feb. 28, 1920, c. 91, §441, 41 Stat. 498, amended Aug. 9, 1935, c. 498, §1, 49 Stat. 543; Aug. 26, 1937, c. 818, 50 Stat. 835; renumbered §25 by Sept. 18, 1940, c. 722, Title I, §14(b), 54 Stat. 919.

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IV.

PORTIONS OF PUBLIC UTILITY CODE

ARTICLE IV

SERVICE AND FACILITIES

Section 401 (66 P.S. §1171). **Character of Service and Facilities.**—Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employes and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility.

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Section 413 (66 P.S. §1183). **Proper Service and Facilities Established on Complaint.**—Whenever the com-

mission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public, and shall fix the same by its order or regulation.

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ARTICLE IX

GENERAL PROVISIONS AND POWERS OF COMMISSION

Section 901 (66 P.S. §1341). **Administrative Authority of Commission; Regulations.**—The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act.

Section 902 (66 P.S. §1342). **Commission to Enforce Act.**—In addition to any powers hereinbefore expressly enumerated in this act, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this act, and the

full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this act shall not exclude any power which the * * *

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